STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL T. ANDARY, M.D., Conservator and Guardian of ELLEN M. ANDARY, LIP, RONALD KRUEGER, Guardian of PHILIP KRUEGER, LIP, and MORIAH, INC., doing business as EISENHOWER CENTER,

Plaintiffs-Appellees,

v

USAA CASUALTY INSURANCE COMPANY, and CITIZENS INSURANCE COMPANY OF AMERICA,

Defendants-Appellants.

Supreme Court No. 164772

Court of Appeals No. 356487

Ingham County Circuit Court Case No. 19-738-CZ

THIS APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' MOTION TO STAY PRECEDENTIAL EFFECT

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STATEMENT OF QUESTION PRESENTED

In a divided decision, the Court of Appeals held that the new fee schedules in Michigan's Amended No-Fault Act do not apply to the treatment of those injured before the amendments' effective date and that, if they did, they would violate Michigan's Contracts Clause. *Andary v USAA Cas Ins Co*, ___ Mich App ___; ___ NW2d ___ (August 25, 2022) (Docket No. 356487). Should this Court stay the precedential effect of the Court of Appeals' decision pending further review?

Defendants-Appellants answer: Yes.

Plaintiffs-Appellees answer: No.

Amicus State Farm answers: Yes.

This Court should answer: Yes.

STATEMENT OF INTEREST

State Farm Mutual Automobile Insurance Company is one of the largest automobile insurers in the State of Michigan.[1] In the decision below, the Court of Appeals held that the new fee schedules in the Amended No-Fault Act do not apply to the future treatment of those injured before the amendments' effective date and that, if they did, they would violate Michigan's Contracts Clause. That decision will have a major economic and jurisprudential impact on the State of Michigan in general, those carrying auto insurance, and the insurance industry. In particular, the Court of Appeals' decision carries potentially severe financial ramifications for State Farm, which is currently subject to more than 450 lawsuits involving injuries allegedly sustained before the No-Fault Act amendments' effective date.

[1] Counsel for State Farm attests that they authored this brief in whole and that no counsel or parties made a monetary contribution intended to fund the preparation or submission of the brief. See MCR 7.312(H)(4).

INTRODUCTION[2]

With Michiganders facing with the highest auto insurance rates in the country—leaving thousands of residents unable to afford insurance—the Legislature took action. Breaking through political gridlock, a bipartisan majority adopted amendments to the No-Fault Insurance Act that were designed to curb excessive medical fees and pass the savings on to Michigan drivers while continuing to provide for the care of those injured in auto accidents. Those goals were realized—$400 rebates have been issued to every Michigan driver and personal protection insurance premiums have begun to decrease while insurers continue to reimburse providers for care.

The decision below throws out the Legislature's work to reduce auto insurance rates in Michigan. Over the dissent of Judge Markey, the divided Court of Appeals held that the new fee schedules in the Amended No-Fault Act do not apply to the treatment of those injured before the amendments' effective date and that, if they did, they would violate Michigan's Contracts Clause. Given that constitutional ruling, if the Court of Appeals is correct, the Legislature is entirely powerless to control the cost of care with respect to automobile accidents incurred

[2] This brief addresses only Insurers' motion to stay the precedential effect of the Court of Appeals' decision. State Farm plans to file a separate motion for leave to file a separate amicus brief addressing Insurers' application for leave to appeal.

in the past—a dramatic limitation on the Legislature's ability to reform a broken No-Fault system.

This Court should stay the precedential effect of that decision while it considers Insurers' application for leave to appeal. The Court of Appeals' decision goes badly astray of this Court's precedents, and this Court is likely to reverse it. The Court of Appeals' "retroactivity" holding rests on a mistaken premise (there is no retroactivity at all, as Judge Markey explained), and, in any event, the Legislature made clear its intent to limit future payments for expenses incurred by those injured both before and after the amendments' effective date. The Court of Appeals' Contracts Clause holding fares no better. In concluding that the new fee schedules are not reasonably related to a legitimate public purpose, the court improperly disregarded the Legislature's determination that reducing Michigan's auto insurance rates justified capping excessive medical fees. The decision below is substantially unlikely to survive this Court's review.

But in the meantime, without a stay of precedential effect, the Court of Appeals' decision threatens to return Michigan's insurance market to pre-reform turmoil—inflicting severe and irreparable financial harm on Michigan drivers, State Farm, and other insurers. Absent a stay, State Farm and other insurers will be required to reimburse medical providers at much higher pre-amendment rates for those injured before the amendments' effective date. That will cost millions of

dollars per year—and those expenses will eventually be passed on to Michigan drivers in the form of higher assessments from the Michigan Catastrophic Claims Association (MCCA). And if this Court ultimately reverses? State Farm will be hard pressed to recover overpayments, which may require it to file hundreds of lawsuits against providers.

This Court has previously stayed the precedential effect of decisions by the Court of Appeals that raised issues of public importance, and that, in the absence of a stay, would have a substantial economic impact on the public at large. See, *e.g.*, *Fradco, Inc v Dep't of Treasury*, 493 Mich 948; 828 NW2d 20 (2013) (staying precedential effect of portion of decision regarding notice requirement for taxpayers' appeals of decisions by Department of Treasury); *Andrie, Inc v Dep't of Treasury*, 493 Mich 900; 922 NW2d 798 (2012) (staying precedential effect of decision holding that retail transactions subject to sales tax were not also subject to use tax). Here, too, a stay is necessary in order to ensure that the Legislature's carefully calibrated effort to reduce premiums is not undermined.

Because this Court is substantially likely to reverse the decision below and because allowing that decision to have precedential effect in the interim will cause irreparable harm to drivers and insurers across Michigan, State Farm respectfully requests that this Court stay the precedential effect of the Court of Appeals' decision as requested by Insurers.

ARGUMENT

I. The Amended No-Fault Act Is a Bipartisan Solution to Michigan's Longstanding Problem of Excessive Accident-Related Costs.

The 2019 amendment to Michigan's No-Fault Insurance Act was a bipartisan legislative achievement that addressed an affordability crisis for Michigan drivers. Michigan's automobile insurance rates were the highest in the nation, due in part to runaway—and sometimes fraudulent—costs that medical providers charged for care given to victims of car accidents.[3]

In an era of intense political polarization, the Michigan Legislature overcame its divisions to rein in insurers' costs, thereby reducing rates and drivers' insurance premiums. The legislation was an immediate success: premiums have dropped for drivers statewide, including for drivers insured by State Farm, and over 200,000 previously uninsured drivers have acquired insurance.[4]

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[3] JC Reindl, *Detroit Mayor Sues Michigan over High No-Fault Auto Insurance Rates*, Detroit Free Press (Aug. 23, 2018), available at <https://www.freep.com/story/money/2018/08/23/no-fault-auto-insurance-lawsuit-mike-duggan/1071905002/> ("Duggan's lawsuit reads as an indictment against the no-fault system for leading to runaway medical costs, unchecked greed and fraud and a surge in recent years of auto accident-related litigation.").

[4] Executive Office of the Governor, *Governor Whitmer, State Leaders Celebrate Cost Savings Provided by Auto No-Fault Reform Law* (July 11, 2022), available at <https://www.michigan.gov/difs/news-and-outreach/press-releases/2022/07/11/governor-whitmer-state-leaders-celebrate-cost-savings-provided-by-auto-no-fault-reform-law>.

The No-Fault Act, originally enacted in 1973, requires Michigan vehicle owners and registrants to purchase "personal protection insurance." MCL 500.3101(1). If an insured is injured in an auto accident, the act provides that personal protection insurance will pay "reasonable charges incurred for reasonably necessary products, services and accommodations for [that] injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a); see also MCL 500.3157(1).

Over time, it became clear that the No-Fault Act incentivized some medical providers to overcharge for care, which contributed to Michigan having the most expensive auto insurance premiums in the country.[5] As a 2019 policy paper put it, "Michigan [wa]s the only state that require[d] drivers to purchase unlimited [personal protection insurance] coverage . . . . This means that in the event of an accident, automobile insurers are on the hook for unlimited medical damages, which drives up the costs of insurance for everyone."[6] By 2019, the cost of those personal

[5] See, *e.g.*, Julie Mack, *Why Michigan Auto Insurance Costs So Much, and How to Lower It*, MLive (May 8, 2019), available at <mlive.com/news/2019/05/why-michigan-auto-insurance-costs-so-much-and-how-to-lower-it.html> (discussing 2013 study finding that "a Detroit medical provider could get $3,279 for a lower back MRI when an auto insurer was paying the bill compared to $484 for a Medicare patient").

[6] Patrick Cooney et al, *Auto Insurance and Economic Mobility in Michigan: A Cycle of Poverty*, Univ Mich Poverty Solutions 3 (Mar. 1, 2019), available at <http://sites.fordschool.umich.edu/poverty2021/files/2021/03/auto_insurance_and_economic_mobility_in_michigan_2.pdf>.

protection insurance benefits accounted for 42% of auto insurance premiums.[7] The average auto insurance policy in Michigan was nearly twice the national average.[8]

The staggering and inequitable cost of car insurance created an affordability crisis, and was widely viewed as exacerbating poverty and unemployment issues.[9] In 2018, the Mayor of Detroit sued the State of Michigan, seeking to have the No-Fault Act declared unconstitutional for its failure to yield "fair and equitable" insurance rates. The Mayor also called for limitations on insurers' personal protection insurance reimbursement obligations to medical providers, citing abuse of the medical billing process as a key cause of the inflation of premiums.[10]

To reduce insurance rates, the Michigan Legislature and Governor Whitmer amended the No-Fault Act effective June 11, 2019. 2019 PA 21; 2019 PA 22. Among many other changes, the amendments established new limits on the amounts that insurance companies are statutorily required to reimburse:

- For providers rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, insurers' reimbursement

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[7] *Id.*

[8] *Id.* at 1.

[9] See, *e.g.*, *id.* ("[T]he cost of auto insurance has become a major barrier to mobility from poverty in Detroit and across the state.").

[10] Reindl, s*upra* note 3.

obligation was limited to 200% of the amount payable for that treatment under Medicare on a fee-for-service basis. MCL 500.3157(2)(a).[11]

- Insurers' obligation for reimbursements subject to the 200% Medicare cap was further limited to the provider's average amount charged for the treatment in 2019. MCL 500.3157(8).

- For treatment not payable under Medicare on a fee-for-service basis, the amendment limited insurers' reimbursement obligation to 55% of the amount charged by the provider. MCL 500.3157(7).[12]

The new fee schedule applies only to treatment rendered on or after July 2, 2021. MCL 500.3157(14).[13]

More than three years later, it is clear that the Legislature accomplished what it set out to do. Auto insurance premiums have declined statewide, with estimates of the total decline ranging from 18% to 27%.[14] Like its industry peers, State Farm

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[11] For treatment rendered from July 2, 2022 to July 1, 2023, the reimbursement rate will be 195%. For treatment rendered after July 1, 2023, the rate will be 190%.

[12] For treatment rendered from July 2, 2022 to July 1, 2023, the reimbursement rate will be 54%. For treatment rendered after July 1, 2023, the rate will be 52.5%.

[13] The Director of the Michigan Department of Insurance and Financial Services defended the constitutionality of the No-Fault Act amendments below. See Director of the Michigan Department of Insurance and Financial Services Amicus Br. at 6, *Andary v USAA Cas Ins Co*, __ Mich App __; __ NW2d __, No. 356487 (Aug. 16, 2022) ("The No-Fault Act amendments at issue here are rationally related to the State's legitimate interest in reducing the cost of automobile insurance and fraud in the No-Fault system.").

[14] Executive Office of the Governor, *Gov. Whitmer Announces Savings for Drivers Under Auto Insurance Reform Law* ("Nov. 16, 2021 Press Release") (Nov. 16, 2021), available at <https://www.michigan.gov/whitmer/news/press-releases/2021/

sought and obtained regulatory approval for reduced rates. The Michigan Catastrophic Claims Association issued $400 refund checks to nearly three-quarters of eligible Michigan residents, with well over $2 billion returned to the pockets of policyholders.[15] And as a result of reform to the No-Fault Act, Michigan no longer has the highest auto insurance rates in the country.[16]

II. This Court Is Likely to Reverse the Court of Appeals' Decision.

The Court of Appeals' decision would unwind the Legislature's achievement, but its legal rationale cannot justify that extraordinary result. The Court of Appeals' majority opinion held: (1) the new fee schedules do not apply to those injured before the amendments became effective because the Legislature did not clearly demonstrate an intent for them to apply retroactively, and (2) even if the new fee schedules did so apply, they would violate the Michigan Contracts Clause. Both

11/16/gov--whitmer-announces-savings-for-drivers-under-auto-insurance-reform-law>.

[15] Executive Office of the Governor, *Whitmer Announces Billions in Auto Insurance Refunds Have Been Issued to Michiganders* (May 3, 2022), available at <https://www.michigan.gov/whitmer/news/press-releases/2022/05/03/whitmer-announces-billions-in-auto-insurance-refunds-have-been-issued-to-michiganders#:~:text=After%20completing%20a%20data%20verification,of%20care%20for%20accident%20survivors>.

[16] Nov. 16, 2021 Press Release, *supra* note 14.

holdings are untenable. A stay of precedential effect is warranted because this Court is substantially likely to reverse the decision below.

A. The New Fee Schedules Are Not Retroactive.

The decision below turns on the premise that insurers applying the new fee schedules to reimburse services provided after the amendments' effective date would constitute a retroactive application of law when applied to those injured *before* the effective date. That premise is erroneous, as there is nothing retroactive about the effect of the amendments.

"A retrospective law is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." *Hughes v Judges' Retirement Bd*, 407 Mich 75, 86; 282 NW2d 160 (1979). The new fee schedules do no such thing. Both before and after the amendments, personal protection insurance benefits have been payable for "[a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). Claims for benefits "accrue not when the injury occurs," but rather "as the allowable expense . . . is incurred." MCL 500.3110(4). Accordingly, if insureds (or providers) had any "vested right[ ]" to payment of personal protection insurance benefits, it would arise at the time of

the medical expense, not the injury. See Cooley, Constitutional Limitations (2d ed), p 391 ("it would seem that a right cannot be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws").

The new fee schedules apply only to expenses incurred *after* the amendments' effective date, so they do not "take[ ] away or impair[ ] vested rights" to payment "acquired under existing laws." *Hughes*, 407 Mich at 85. In reaching the opposite conclusion, the Court of Appeals disregarded the foundational point that "[a] statute is not regarded as operating retrospectively because it relates to an antecedent event." *Id.* at 86; see also *Andary v USAA Cas Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (August 25, 2022) (Docket No. 356487) (MARKEY, P.J., dissenting), slip dissent at 4-5.

Even if the majority were correct that applying the fee schedules to yet-to-be-incurred expenses is somehow a retroactive application of law, the statute leaves no doubt that the Legislature intended that result. The amended No-Fault Act provides that "[a]n insurer shall pass on . . . savings realized from the application of [the new fee schedules] to treatment, products, services, accommodations or training rendered to individuals who suffered accidental bodily injury from *motor vehicle accidents that occurred before July 2, 2021*." MCL 500.2111f(8) (emphasis added).

This provision, which was adopted at the same time as the new fee schedules, expressly refers to the new fee schedules and mandates insurers to pass on the savings realized from applying those fee schedules to accidents occurring before the effective date of the amendments. If, as the majority below concluded, the new fee schedules do not apply to expenses incurred by those injured before the amendments' effective date, the provision would make no sense as there would be no "savings" at all with respect to accidents occurring before July 2, 2021. The Court of Appeals thus violated one of the cardinal principles of statutory interpretation: that "[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980); see *Andary*, slip dissent at 5-6 ("the majority's ruling essentially circumvents and renders meaningless to a great extent, the dictates of MCL 500.2111f(8)").

Given the Legislature's stated goal of lowering auto insurance rates, 2019 PA 21; 2019 PA 22, it would make little sense to read the new fee schedules as applying only to the treatment of those injured after the amendments' effective date. If the Court of Appeals' reading were correct, there would be no immediate savings from the fee schedules. At least initially, the amendments would do nothing at all, if they applied only to accidents that had not yet occurred at the time of the effective date. This Court should not adopt a statutory reading that violates the Legislature's intent

and leads to absurd results. *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999).

B. The New Fee Schedules Do Not Violate the Contracts Clause.

The Court of Appeals also erred in its conclusion that the new fee schedules violate the Contracts Clause of the Michigan Constitution. Const 1963, art 1, § 10. To determine whether a state law violates the Michigan Contracts Clause, courts ask (1) whether the law substantially impairs a contractual relationship. If so, the law is still valid so long as (2) the impairment is "necessary to the public good" and (3) "the means chosen by the Legislature to address the public need are reasonable." *In re Certified Question*, 447 Mich 765, 777; 527 NW2d 468 (1994). The new fee schedules easily survive this test.

First, the new fee schedules do not impair a contractual relationship at all because the *extent* of personal protection insurance benefits is and has always been established by the No Fault Act, not any insurance policy. See *Bronson Health Care Group, Inc v State Auto Prop & Cas Ins Co*, 330 Mich App 338, 342; 948 NW2d 115 (2019) ("PIP benefits are mandated by the no-fault act, and a claimant's entitlement to PIP benefits is therefore based in statute, not in contract".).

Second, even if the new fee schedules did impair contracts, doing so would be "necessary to the public good." The amendments to the No-Fault Act were a careful, bipartisan solution to a problem that had plagued the State for decades—high auto

insurance rates and the resulting widespread social ills, such as leaving up to 60% of Detroit drivers without any auto insurance coverage.[17] As the Legislature explained, the amendments were designed "to provide for the continued availability and affordability of automobile insurance . . . in this state and to facilitate the purchase of that insurance by all residents of this state at fair and reasonable rates." 2019 PA 21; 2019 PA 22. To that end—and as MCL 500.2111f(8) expressly spells out—the new fee schedules were intended to reduce payments for expenses incurred by those injured before the amendments' effective date and pass those savings on to the State's insureds. As such, there can be no question that the new fee schedules serve the public good—particularly given the overriding deference due the Legislature in matters of economic and social regulation. See *Romein v Gen Motors Corp*, 436 Mich 515, 535; 462 NW2d 555 (1990).

Third, the new fee schedules were plainly a reasonable means of accomplishing the Legislature's goal: No one disputes that the new fee schedules have accomplished just what the Legislature intended, leading to substantial savings for insureds across the State.

The amendments do not satisfy any of the factors for a Contracts Clause violation, much less all of them. See *Andary*, slip dissent at 7-10.

[17] See Reindl, *supra* note 3.

As Judge Markey's dissent explains, the majority opinion is mistaken. Its retroactivity decision both rests on a faulty premise and misapprehends the Legislature's unmistakable intent to limit payments for expenses incurred by those injured before the amendments' effective date. Further, the majority's Contracts Clause analysis improperly casts aside the Legislature's judgment that Michigan's prohibitive auto insurance rates were a grave public problem necessitating the new fee caps. Because this Court is substantially likely to reverse the decision below given these errors, a stay of precedential effect is warranted.

III. State Farm, Along with Other Insurers and Drivers Across Michigan, Will Suffer Irreparable Harm Absent a Stay.

In addition to its flaws on the merits, the Court of Appeals' decision threatens to irreparably harm drivers and insurers alike. The effect of that decision, absent a stay, is that State Farm (and other insurers) will be required to reimburse medical providers at pre-amendment rates for all patients who sustained their injuries before July 2, 2021.

These substantial additional costs will not be borne by insurers alone. The MCCA—which reimburses insurers for certain catastrophic claims, see MCL 500.3104—will likely be required to increase its outlays for once-again uncapped medical expenses. And eventually those costs will be passed on to policyholders.

If this Court declines to stay the precedential effect of the Court of Appeals' decision, and insurers like State Farm are bound to resume reimbursing providers at pre-amendment rates, the overall costs faced by Michigan drivers will rise substantially. Michigan will once again face the challenge of high auto insurance costs, and the Legislature's bipartisan solution to that crisis will be severely undermined. Staying the precedential effect of the Court of Appeals' decision accords with what this Court has recognized as insurers' "fiduciary duty to others in the insurance pool to not dissipate the pool's insurance fund reserves by paying unwarranted benefits." *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 596-97; 648 NW2d 591 (2002).

In the immediate term, State Farm is currently subject to more than 450 lawsuits involving injuries allegedly sustained before the No-Fault Act amendments' effective date.[18] Should a stay be denied, State Farm may be required to reimburse providers at pre-amendment rates on both a prospective basis—for services rendered

[18] This number—which represents lawsuits pending in state and federal court based on injuries allegedly sustained before June 11, 2019—grows every day. Roughly 50 of these cases directly challenge the supposedly "retroactive" application or constitutionality of the fee schedules in the complaint. In other cases, the plaintiffs have challenged the application of the fee schedules during varying stages of litigation despite not raising any explicit challenge in the complaint. In those cases in which the plaintiffs have not yet directly challenged the fee schedules, State Farm anticipates that the plaintiffs will raise the issue shortly in light of the Court of Appeals' decision in *Andary*.

after the date on which a stay is denied—and by making providers "whole" for more than a year of purported underpayment, dating back to the amendments' July 2, 2021 effective date. State Farm estimates that it would owe millions of dollars per year in additional reimbursement costs without a stay of the precedential effect of the Court of Appeals' decision.

If this Court reverses the Court of Appeals—as is likely, for the reasons explained above—its decision would undo the precedential effect of the Court of Appeals' decision. See *Mich Educ Employees Mut Ins Co v Morris*, 460 Mich 180, 193-97; 596 NW2d 142 (1999). As a result, any reimbursement amounts that State Farm paid to medical providers under the No-Fault Act, over and above the new fee schedule rates, would be *overpayment*, and as a legal matter it would be "clear that [providers] received payments to which they are not entitled." *Id*. at 197.

But it is far from clear that State Farm could *recover* overpayments. See *id*. at 197, 199 ("whether [insurers] are entitled to reimbursement of . . . overpayments is a separate question" from whether they overpaid and requires a showing that the insurer is "equitably entitled to any reimbursement"). And even if State Farm could establish a viable legal claim to recover overpaid coverage amounts, it may require the filing of hundreds of lawsuits to recover any excess reimbursements. Doing so would clog up the court system with lawsuits seeking repayment of amounts that are individually modest, but very substantial in the aggregate. Industry-wide, Michigan

insurers and the MCCA may be required to pay out *hundreds* of millions of dollars in reimbursement costs that they will have overpaid and be unable to recover, in the likely event that this Court reverses.

CONCLUSION

State Farm respectfully requests that this Court stay the precedential effect of the Court of Appeals' decision as requested by Insurers.

Respectfully submitted,

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Dated: September 27, 2022

CERTIFICATION OF WORD COUNT

This document complies with the type-volume limitation of MCR 7.312(A) and 7.212(B) because, excluding the part of this document exempted, this brief contains 3,661 words, as measured by Microsoft Word's count function.

Respectfully submitted,

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